CYNTHIA GLORIA LOUIS A

v.

MICRO CONSOLIDATION SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
VINCENT NG J
[SUIT NO: D1-22-1166-2003]
29 NOVEMBER 2006

CIVIL PROCEDURE: *Amendment - Defence - Application for leave to amend existing defence - Whether proposed amendment would prejudice plaintiff - Whether character of defence altered - Whether application bona fide - Rules of the High Court 1980, O. 20 r. 5(5), O. 20 r. 8(1)* C

CIVIL PROCEDURE: *Pleadings - Amendment of defence - Application for leave to amend existing defence - Whether proposed amendment would prejudice plaintiff - Whether character of defence altered - Whether application bona fide - Rules of the High Court 1980, O. 20 r. 5(5), O. 20 r. 8(1)* D

This was an appeal by the fifth defendant against the decision of E
the senior assistant registrar (SAR) dismissing its application (encl. 33) under O. 20 r. 5 of the Rules of the High Court 1980 ('RHC') for leave to amend the existing defence as per the proposed amended defence annexed with the application. The F
plaintiff, a company secretary by profession, was employed by the fifth defendant. In consideration of the plaintiff's employment, the fifth defendant executed a letter of indemnity dated 17 October 1991 in favour of the plaintiff agreeing and undertaking to indemnify and hold the plaintiff harmless from all losses, costs and damages which may be incurred by the plaintiff in acting as G
secretary to the fifth defendant's clients at the fifth defendant's request. Subsequently, a consent judgment was purportedly recorded before the judge in Commercial Court 3, wherein the plaintiff purportedly agreed *inter alia* to pay damages to the first defendant. In the present case, the plaintiff prayed for a court H
declaration that if she was found liable to pay any judgment sum to the first defendant pursuant to the said consent judgment, the fifth defendant was liable to fully indemnify the plaintiff pursuant to the said letter of indemnity of 17 October 1991. The main thrust of the fifth defendant's substantive defence was that the I
plaintiff's claim was pre-mature for the reason that at the time of filing of the writ no loss had been ascertained or demanded from

A the plaintiff by any party. It was contended by the fifth defendant that the proposed amended defence was wholly consistent with the existing defence, even though the proposed amendment had also sought to retract certain apparent admissions in the existing defence. It was thus submitted that the proposed amendment if B allowed would not alter the character of the existing defence.

Held (allowing fifth defendant's appeal):

(1) To refuse the fifth defendant's application would cause more harm and injustice to the fifth defendant at the full hearing C because the fifth defendant would be circumscribed by its pleadings. If the fifth defendant's application was allowed, the plaintiff could still amend its reply of right. This would rightly allow the plaintiff to controvert any new averments by adducing appropriate evidence to counter the updated defence D by the fifth defendant, through the proposed amended defence. Hence, the plaintiff would not be prejudiced. (para 14)

(2) The fifth defendant's proposed amended defence would not E alter the character of its defence save for the admission which it now sought to retract. The proposed amended defence only sought to set out more clearly the facts relied on to support their defence which had already been stated in the existing defence. The fifth defendant only intended to paraphrase the F existing defence with more clarity by deletion and adding new paragraphs. The application was made for the purpose of determining the real question in controversy between the parties in the present case. If a retraction was not allowed, it would be unjust to allow the plaintiff to contend and the fifth G defendant was circumscribed by its pleadings, when, at the trial, evidence is adduced on the facts pertaining to the disallowed retraction.

(3) The further eminently compelling reason to allow the retraction H of an admission is that, should leave be refused the court would have predetermined the whole or part of the case based on pleadings and not evidence, considering that unsworn pleadings do not constitute evidence for determination of an action. The fifth defendant has met all the three conditions set I out therein and this court should not brush aside the provisions in O. 20 r. 5(5) read with O. 20 r. 8(1) of the Rules of the High Court 1980.

(4) The court should be strongly averse to exercise its discretion to allow substantive or material amendments at the stage after the opposite party has led his evidence in chief *viva voce* or after witness statement affidavits for evidence-in-chief have been admitted at the trial as it is trite law that the other party is entitled to know the case that he or she would have to meet – so as not to be taken by surprise. This application was made *bona fide.*

Case(s) referred to:
Hollis v. Burton [1892] 3 Ch 226 ***(not foll)***
Lee Ah Lan v. Lee Kim Lan Construction Industries [2003] 2 CLJ 585 HC ***(refd)***
*Raphael Pura v. Insas Berhad & Anor [2000] 4 CLJ 830 CA****(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 rr. 5, 8(1)

Rules of the High Court [Sing], O. 20 r. 5(1), (5)

Other source(s) referred to:
Sir Jack S Goldrein, *Pleading: Principles and Practice*, pp 111, 198, 199, 200

For the plaintiff - Conrad Young; M/s Sivananthan
For the 5th defendant - Sitpah Selvaratnam; M/s Tommy Thomas

Reported by Suhainah Wahiduddin

JUDGMENT

Vincent Ng J:

The Appeal

[1] This is an appeal by the 5th defendant against the decision of the learned senior assistant registrar ('SAR') dismissing with costs, the 5th defendant's application (encl. 33) under O. 20 r. 5 of the Rules of the High Court 1980 ('RHC') for leave to amend the existing defence as per the proposed amended defence annexed with the application.

[2] For better and proper appreciation of the appeal, I find it necessary to discuss the background at some length.

The Plaintiff's Case

[3] The plaintiff is a company secretary by profession. Between 8 August 1998 to 30 November 1999 she was employed by the 5th defendant, pursuant to which employment the plaintiff had from time to time upon the request of the 5th defendant acted *inter alia* as company secretary for the 5th defendant's clients. In consideration of the plaintiff's employment, the 5th defendant executed a Letter of Indemnity dated 17 October 1991 in favour of the plaintiff agreeing and undertaking to indemnify and hold the plaintiff harmless from all losses, costs and damages which may be incurred by the plaintiff in acting as secretary to the 5th defendant's clients at the 5th defendant's request. One of the 5th defendant's clients was the 3rd defendant, a company incorporated under the laws of Malaysia. The plaintiff acted as secretary for the 3rd defendant jointly with the 2nd defendant, another employee of the 5th defendant. In 1998, the 1st defendant commenced proceedings against the plaintiff, the 3rd defendant and the 2nd defendant *vide* Kuala Lumpur High Court Number 3 Originating Summons No. D3-24-97-98 (Commercial Court No. 3), wherein the 1st defendant alleged that it had been agreed that 2,550,000 shares in the 3rd defendant which was registered in the name of the 4th defendant be transferred to itself, but due to the negligence of the plaintiff and the 2nd defendant, they did not get back to the 1st defendant with duly executed share transfer forms, which was neither prepared nor effected. On 26 February 2001 a consent judgment was purportedly recorded before the learned judge in Commercial Court No. 3, wherein the plaintiff purportedly agreed *inter alia* to pay damages, to be assessed, to the 1st defendant. The plaintiff sought to set aside the consent judgment on the grounds that that consent judgment was not entered upon her instructions but upon instructions of one Yeoh Chong Keat, the director of the 5th defendant, who in turn was instructed by the 3rd and 4th defendants. In the present case, the plaintiff prays for a court declaration that, if she is found liable to pay any judgment sum to the 1st defendant pursuant to the said consent judgment in Commercial Court No. 3, the 5th defendant is liable to fully indemnify the plaintiff pursuant to the said Letter of indemnity of 17 October 1991. The main thrust of the 5th

defendant's substantive defence is that the plaintiff's claim is premature for the reason that at the time of filing of the writ no loss has been ascertained or demanded from the plaintiff by any party.

The Application For Amendment

[4] The nature and extent of the amendments in its defence where leave is sought by the 5th defendant are as set out in its draft proposed amendments (with the proposed additions highlighted and deletions cancelled in the draft). Upon study of the draft proposed amended defence it is evident that the 5th defendant has sought to re-write the whole of the existing defence which, notably, was filed through the 5th defendant's former solicitors, M/s Gidoen Tan Razali Zaini. This suit is presently at the stage of case management, and directions for preparation for trial have been given, which however could not be enforced due to this application for amendment now under appeal.

[5] The present solicitors acting for the 5th defendant, M/s Tommy Thomas, took over conduct of the matter from the previous solicitor on or about 20 June 2005, when a notice of change of solicitor was filed. This court was, during case management on 13 September 2005, informed of the 5th defendant's intention, upon advice of M/s Tommy Thomas, to amend the defence and soon thereafter on 21 October 2005, the application for amendment was filed. The grounds for making the application that appears in the affidavit in support of the application affirmed by one Ng Kuan Yee, the Group Finance Manager of the 5th defendant bears quotation. This was how they were deposed:

> 4. I crave leave of this Honourable Court to refer to the proposed amendments to the 5th Defendant's Defence ("the Proposed Amendments") attached to the 5th Defendant's application to amend its Defence and filed herein and which Proposed Amendments are necessary for determining the real question in controversy between the parties and to facilitate the full and proper determination of this matter by this Honourable Court.
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> 5. I am advised by solicitors for the 5th Defendant and verily believe that the Proposed Amendments if allowed, will not embarrass, cause injustice or will prejudice the Plaintiff in any manner that cannot be compensated by costs.

A 6. I am further advised by solicitors for the 5th Defendant and verily believe that the Proposed Amendments do not add any new cause of action nor alter the nature of Defence of the 5th Defendant.

B **[6]** The other defendants, namely, the 1st to 4th defendants and the 6th defendant was on record as having no objections to the application. It was contended by the 5th defendant that the proposed amendments would set out more clearly the real facts on which the 5th defendant based its defence. The 5th defendant alleges that no sums are payable by the 5th defendant to the C plaintiff as the plaintiff's claim is pre-mature. And alternatively, in the event that the consent judgment in the case in Commercial Court 3 is not set aside, no sums are payable because the plaintiff's claim does not fall within the ambit of the said Letter of Indemnity. Further, in regard to the plaintiff's claim on the D indemnity, the 5th defendant would put the plaintiff to strict proof that she has acted within the course of her employment. Hence, it was contended by the 5th defendant that the proposed amended defence is wholly consistent with the existing defence, even though the proposed amendment had also sought to retract E certain apparent admissions in the existing defence. It was thus contended that, the proposed amendment if allowed will not alter the character of the existing defence.

Objection By The Plaintiff

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[7] In her affidavit affirmed on 9 January 2006 (encl. 36) the plaintiff says that she does not object to the deletion of averments Nos. 2, 4, 5, 7, 8, 10, 11, 15, 19 and 20 of the 5th defendant's existing defence and substitution with averments Nos. 1, 2, 3, 4, G 5, 6, 7, 8, 9, 10, 11, 16, 19 and 20 in the draft proposed amended defence. She however objects to deletion of averments no. 6, 9, 13, 14 and 17 and substitution with paras 12, 13, 14, 15 and 17. The plaintiff argues that the impugned amendments should not be allowed because the 5th defendant has: (a) sought H 'to withdraw an admission' by their deletion of averments Nos. 6, 9, 13, 14 and 17 of the defence; (b) made fresh 'unparticularised assertions' in averments Nos. 12, 13 and 17 of the draft proposed amended defence; and, (c) averments Nos. 14 and 15 in the draft proposed amended defence are 'not positive assertions raising any I defence'.

[8] It is the plaintiff's contention that where any admission is sought to be withdrawn by amendments, it must be shown that the admission was made inadvertently or that new facts have emerged justifying the withdrawal of the admission. Only then, and if the court satisfied with the explanation, will the court allow the proposed amendments. In support of that contention the counsel for the plaintiff cited a passage at p 200 of *Pleading: Principles and Practice* by Sir Jack S. Goldrein and *Hollis v. Burton* [1892] 3 Ch 226. And, as it is common ground that the 5th defendant has not proffered any explanation to the effect that the admissions were made inadvertently, the amendments sought must be disallowed. As to the proposed amendments which sought to plead that the plaintiff's claim does not fall within the ambit or scope of the indemnity and/or is pre-mature, the plaintiff says that they are assertions bereft of particulars or grounds. And, that the other proposed amendments seek to place a burden on the plaintiff to prove certain matters, in which the plaintiff has no such burden as her claim was based on an indemnity given by the 5th defendant.

The Law

[9] The issue in this case hinges on the interpretation of O. 20 of our Rules of the High Court ('RHC') 1980. This rule is in *pari materia* with the English Rules and similar to the Singapore Rules, which reads:

> Amendment of writ or pleading with leave (O. 20 r. 5(1)
>
> (1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

[10] And, O. 20 r. 5(5) states:

> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by party applying for leave to make the amendment.

[11] Further, O. 20 r. 8(1) of the RHC prescribes that leave may be allowed by the court for amendment of any document in the proceedings:

> (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings,

[12] The law relating to application for amendment is trite. Mohamed Azmi FJ in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 *(Yamaha Motor)* delivering the judgment of the Federal Court at has spelt out the principle applicable in an application for amendment quite lucidly and succinctly in the following terms:

> Under O. 20 of the Rules of the High Court 1980, which is equivalent to O. 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] MLJ 248). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* page 342). *If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action* in respect of which relief has already been claimed in the original statement of claim. In this appeal it is unfortunate that the learned Judge had failed to set out anywhere in the appeal records the factor or factors which he had taken into consideration in the exercise of his discretion to dismiss the appellants' application. We must therefore review the application afresh.

[13] Thus, the exercise of judicial discretion to grant or refuse leave to amend is to be determined depending on the facts and circumstances of each case and with the view to "determining the real question in controversy between the parties" as enjoined in O. 20 r. 8. (see *Lee Ah Lan v. Lee Kim Lan Construction Industries* [2003] 2 CLJ 585; and see also *Raphael Pura v. Insas Berhad & Anor* [2000] 4 CLJ 830).

[14] It is common ground that trial dates have not been fixed and the case is only at the case management stage. Even though encl. 33 was filed two years and eight months after the filing of this writ, I am of the view that since, under O. 20 r. 5(1), an application could be made at any stage in the proceedings the 5th defendant is not time barred from making this application. It is trite that the function of pleadings is to ensure that parties should not be taken by surprise at the trial. If the 5th defendant is not allowed to amend its existing defence, it would, at the trial be bound by the original pleadings and would be barred from adducing any evidence beyond the perimeter of the existing defence; and this court would be hamstrung in the proper determination of the real issues between the parties. To refuse the 5th defendant's application, in my view causes more harm and injustice to the 5th defendant at the full hearing because the 5th defendant would be circumscribed by its pleadings. If the 5th defendant's application is to be allowed, the plaintiff could still amend its reply as of right. This would rightly allow the plaintiff to controvert any new averments by adducing appropriate evidence to counter the updated defence by the 5th defendant, through the proposed amended defence. Hence, I am satisfied that the plaintiff would not be prejudiced. In any event, should the plaintiff be of the opinion that the amended defence could not be sustained under the law or it contains scandalous or frivolous or vexatious or prolix averments, the plaintiff would be at liberty to apply to strike out the amended defence. Also, if the plaintiff, on advice of her solicitor, is of the view that the proposed amended defence, if allowed, contains averment devoid of any particulars, it is open to her to apply for further and better particulars. For the foregoing reasons, I am of the view that the plaintiff could be compensated with costs if the proposed amendment is allowed.

[15] Whether the proposed amendment would result in the success or otherwise of the 5th defendant defence and the dismissal of the plaintiff's action ought not to be of paramount consideration. I am *ad idem* with the view expressed by the learned judge in *Lee Ah Lan v. Lee Kim Lan Construction Industries* [2003] 2 CLJ 585 where at p 591 he said:

> The fact that the proposed amendment does not seem to fit into the scheme of things as spelt out in the first defendant's pleadings or does not appear to coincide with the defence of the first defendant, does not demonstrate one way or the other the *bona*

fide or *mala fide* of the second defendant, because the second defendant as a party is perfectly entitled to arrange or conduct her defence or pleading in the best way to serve her interest as the utmost priority, and indeed without any due regard whatsoever to the interest of any other party. The same principle would apply if the first defendant were to apply for leave to amend the first defendant's pleading.

[16] Upon careful perusal of the affidavits and exhibits annexed with the application under appeal, I am satisfied that the 5th defendant's proposed amended defence will not alter the character of its defence save for the admission which it now seeks to retract which I shall deal with later in my judgment. My reason is this. Even as its stands the defence alleges that that no sums are payable to by the 5th defendant to the plaintiff; that the plaintiff's claim is pre-mature for the reasons that no loss having been ascertained; and that the plaintiff's claim on the indemnity is denied. I am also inclined to accept that the proposed amended defence only seeks to set out more clearly the facts relied on to support their defence which has already been stated in the existing defence. The 5th defendant, in the proposed amended defence, does not deny that the plaintiff was formerly in the employment of the 5th defendant. The 5th defendant only intended to paraphrase the existing defence with more clarity by deletion and adding new paragraphs. Indeed, different counsel do practice different styles of writing and this ought not to be proscribed, if the intended amendment fell squarely within the test prescribed in *Yahama*'s case.

[17] The only sole issue left to be separately dealt with by this court is whether the 5th defendant's attempt to delete the apparent admission through the proposed amended defence ought to be allowed. On the authority of *Hollis v. Burton* [1892] Ch 226 the plaintiff contended that the sole ground, which would vest the court with the discretion to allow the retraction of any admission in a pleading, is that the admission was made inadvertently. It is important and pertinent to note that in that English case, Burton had primarily sought to set aside a valid order against him and in that context he had also to apply to withdraw his admission in his defence.

[18] Lord Lindley LJ (at pp 235-256) in *Hollis v. Burton (supra)* made the following *dicta*:

Mr. Burton comes to the Court and says: 'Relieve me from that order. I made a mistake; and not only relieve me from that order, which is a small matter, but give me liberty to amend my defence, to withdraw my admission, and to fight the case'.

Now, upon what term ought such permission to be given? Ought the only term to be upon payment of the costs of the application? It appears to me that would not necessarily be so. It might be so under some circumstances; **but in considering what is fair and just between the parties when a person comes to set aside a valid order against him,** we must see what the evidence is which he adduces, **and the grounds upon which he alleges that he ought to have the relief** which he asks. ... (emphasis added)

[19] Sir Jack Jacob's *'Pleadings: Principles and Practice* at pp 111, 198, 199 and 200, as follows:

Object The primary object of the defence is:

(a) to inform the plaintiff precisely how much of the statement of claim the defendant admits and how much he denies; and

(b) what grounds and facts the defendant relies on to defeat the claim of the plaintiff. …

Absence of "good faith" The first and paramount consideration is whether the application for leave to amend is made in good faith; ie, for the purpose of raising "the real question in controversy between the parties." See RSC, Ord. 20, r. 8(1). Indeed the first question the court asks itself when dealing with an application for leave to amend is: "Is this genuine or, what lies behind the application?" The amendment must not be dishonest, nor intended to overreach the opposite party, or made for any other ulterior motive. The amendment must be based on facts which are substantially true and germane to the matters in controversy between the parties. If, therefore, the court is not satisfied as to the truth and substantiality of the proposed amendment, it will be refused. See *Lawrence v. Lord Norreys* [1888] 39 Ch.D. 213, per Stirling J at 221, and per Bowen LJ at 235; and see also *Lawrence v. Lord Norreys* [1890] 15 App. Cas. 210. As to adding a charge of fraud see p. 166, *supra*. Such an amendment will only be allowed, even at an early stage, if the circumstances justify it. See *Lever v. Goodwin* [1887] 36 Ch. D (CA); *Symonds v. City Bank* [1886] 34 WR 364, *Hendriks v. Montagu* [1881] 50 LJ Ch. 257 at 260. The statement of Lord Esher MR in *Bently v. Black* [1893] 9 TLR 580, that "[i]t had for a long time been a universal practice, except in the most exceptional circumstances, not to allow amendments for the

purpose of adding a plea of fraud where fraud had not been pleaded in the first instance" should be read subject to the requirement that the court is satisfied about the bona fides of the application and the charge of fraud." In special circumstances it may be allowed at the trial. See *Riding v. Hawkinds* [1889] 14 PD 56 (CA); and see *Behn v. Bloom* [1911] 132 LTJ 87 (amendment at trial refused). In any event, an amendment to introduce a charge of fraud for the first time should not be allowed by the Court of Appeal. *Bradford Third Equitable Benefit Building Society v. Borders* [1942] 2 All ER 205 (HL).

Materially – an off-shoot of the paramount requirement of good faith

The court will look at the materiality of any proposed amendment. *Ibid.* It will, as a rule, refuse leave to make immaterial and useless amendments *Wood v. Earl of Durham* [1888] 21 QBD 50 or merely technical or trivial amendments. *Sinclair v. James* [1894] 3 Ch. 554; *Durham Brothers v. Robertson* [1898] 1 QB 765; *Bevan v. Barnett* [1897] 13 TLR 130, and see *Litchfield v. Dreyfus* [1906] 1 KB 584. Thus:

(a) an amendment which if made would set up a claim or defence which is bad in law will not be allowed *Collette v. Goode* [1876] 7 Ch. D 842; *Collette v. Goode* [1876] 7 Ch. D 842; *Dillion v. Balfour* [1886] 20 Ir. LT 600; and see *Edevain v. Cohen* [1889] 41 Ch. D 563; 43 Ch. D 187;

(b) not will an amendment to add an unnecessary counterclaim be allowed *Central Queensland Meat Co. v. Gallop* [1892] 2 QB TLR 225; *Machado v. Fontes* [1897] 2 QB 231, (CA);

(c) nor to add a claim to recover only nominal damages *Mashall v. Langley* [1889] WN 222; *Factories Insurance Co. Ltd. v. Anglo-Scottish General Commercial Insurance Co.* [1913] 29 TLR 312 (CA); and

(d) where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable would not be allowed. *McManus v. Fortescue* [1907] 2 KB 1 at 5.

Withdrawal of admission Where an amendment seeks to withdraw an admission, the court will inquire into the circumstances in which the admission was made. It will grant such leave only:

(a) where the admission was made inadvertently. See *Clarke v. Yorke* [1882] 31 WR 62; *Hollis v. Burton* [1892] 3 Ch. 226 at 23; or

(b) where new facts have come to light justifying its withdrawal.

[20] The 5th defendant's application through encl. 33 is for an entirely different reason. I am satisfied that the application was made for the purpose of determining the real question in controversy between the parties in the present case. The issue at hand is whether the court could only exercise its discretion upon the restricted terms in *Hollis v. Burton (supra)* as contended by the plaintiff's counsel. I do not think so, for the logical and cogent reason that if a retraction is not allowed at this stage, it would be clearly unjust to allow the plaintiff to contend and that the 5th defendant is circumscribed by its pleadings, when, at the trial, evidence is adduced on the facts pertaining to the disallowed retraction. The further eminently compelling reason to allow the retraction of an admission is that, should leave be refused the court would have predetermined the whole or part of the case based on pleadings and not evidence, considering that unsworn pleadings do not constitute evidence for determination of an action. My approach on this aspect of the plaintiff's contention is clearly supported by the ratio in *Yamaha Motor (ibidem)*, as I find that the 5th defendant has met all the three conditions set out therein and this court should not brush aside the provisions in O. 20 r. 5(5) read with O. 20 r. 8(1) of the RHC. *Hollis v. Burton (supra)* which for reasons which I have set out, is based on an entirely different factual matrix and is clearly inapplicable, as the purpose of the application to amend in that case was only incidental to the primary purpose of setting aside a valid order against the applicant. In any event, the plaintiff should be allowed liberty to cross-examine the 5th defendant at the trial on the retractions as well as amendments with the view to attacking credibility. I am of the considered view that the court should be strongly averse to exercise its discretion to allow substantive or material amendments at the stage after the opposite party has led his evidence in chief *viva voce* or after witness statement affidavits for evidence-in-chief have been admitted at the trial as it is trite law that the other party is entitled to know the case that he or she would have to meet – so as not to be taken by surprise. In my view, the 5th defendant's application for amendment was also, for the above reasons, in accord with the principles set out in Sir Jack Jacob's *'Pleadings Principles and Practice'*.

[21] Thus, whether to allow or dismiss an application for retracting an admission which is apparent or otherwise, the court must consider the justice of each particular case, which need not be restricted only, to cases whereby the admission was inadvertently made. In any event the 5th defendant contends that the application is necessary as the admission was inadvertent, and also to put forward before the court the real issue in controversy between the parties, I accept that the application was made *bona fide* and that this is a proper case for the plaintiff to be compensated in costs. In the upshot, the 5th defendant's appeal ought to be and is now allowed, but with costs for the application and this appeal is to be borne and paid by the 5th defendant to the plaintiff in any event. Leave to amend as proposed in the draft amendment appended to summons-in-chambers (SIC) dated 21 October 2005 is now allowed, save that proposed averment No. 15 is disallowed and No. 14 is allowed as further amended on the draft.